

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CARLENE BECHEN,
ELVIRA BUMPUS, RONALD
BIENDSEIL, LESLIE W. DAVIS, III,
BRETT ECKSTEIN, GLORIA ROGERS,
RICHARD KRESBACH, ROCHELLE
MOORE, AMY RISSEEUW, JUDY
ROBSON, JEANNE SANCHEZ-BELL,
CECELIA SCHLIEPP, TRAVIS
THYSSEN, CINDY
BARBERA, RON BOONE, VERA
BOONE, EVANJELINA CLEERMAN,
SHEILA COCHRAN, MAXINE HOUGH,
CLARENCE JOHNSON, RICHARD
LANGE, and GLADYS MANZANET,

Plaintiffs,

Case No. 11-CV-00562
JPS-DPW-RMD

TAMMY BALDWIN, GWENDOLYNNE MOORE and
RONALD KIND,

Intervenor-Plaintiffs,

Members of the Wisconsin Government
Accountability Board, each only in his
official capacity: MICHAEL BRENNAN,
DAVID DEININGER, GERALD NICHOL,
THOMAS CANE, THOMAS BARLAND,
and TIMOTHY VOCKE, and KEVIN
KENNEDY, Director and General Counsel
for the Wisconsin Government
Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR.,
THOMAS E. PETRI, PAUL D. RYAN, JR.,
REID J. RIBBLE, and SEAN P. DUFFY.

Intervenor-Defendants.

VOCES DE LA FRONTERA, INC.,
RAMIRO VARA, OLGA VARA,
JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-CV-1011
JPS-DPW-RMD

Members of the Wisconsin Government
Accountability Board, each only in his
official capacity: MICHAEL BRENNAN,
DAVID DEININGER, GERALD NICHOL,
THOMAS CANE, THOMAS BARLAND,
TIMOTHY VOCKE, and KEVIN
KENNEDY, Director and General Counsel
for the Wisconsin Government
Accountability Board,

Defendants.

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO MOTION FOR REVIEW
BY THREE-JUDGE COURT OF ORDERS OF DECEMBER 8, 2011, AND
DECEMBER 20, 2011

Introduction

This discovery dispute is between the plaintiffs and the Legislature. And yet the plaintiffs insist on dragging the defendants (the members and executive director of the Government Accountability Board) into the middle of it by pretending there is no difference between the Executive and Legislative branches of government.

With each discovery-related document they file, the plaintiffs reveal more completely their basic misunderstanding of the nature and structure of Wisconsin's

government. As defendants have told the plaintiffs on several occasions, the Legislature is not the same as the Government Accountability Board (an independent Executive agency), and neither of them are controlled by the Department of Justice.

But the plaintiffs persist in their refusal to understand that, like all other states in this country, Wisconsin's government has a tri-partite structure in which the separation of powers doctrine is one of the most elemental of principles. Their response to the Legislature's motion for a full panel review of certain discovery-related orders is simply the latest installment in their bid to re-imagine our government as an amorphous mass devoid of any intelligible distinctions in form, function, or responsibility.

Although the plaintiffs' fundamental error may pass without comment in casual conversation amongst laymen, it is impossible to ignore when offered by trained professionals in a court of law. Especially when that error serves as the plaintiffs' only basis for smearing the Government Accountability Board as delinquent in its discovery obligations. Defendants submit this reply to correct – again – the plaintiffs' misunderstanding of Wisconsin's governmental structure and so answer their accusations of improper conduct.

Discussion

So far as they relate to the Government Accountability Board, plaintiffs' complaints follow three basic themes. First, that the defendants' attorneys turned a deposition into a "parody" (to use plaintiffs' word) by instructing one of the

deposition witnesses not to answer questions that would invade the defendants' privileged conversations and work product. Second, that the Government Accountability Board failed to produce documents that would provide evidence of the Legislature's "intent" in passing 2011 Acts 43 & 44. And third, that the defendant's conduct of its defense somehow offends this Court's prior orders, for which they request a ruling that they may have attorney's fees from the Government Accountability Board for any discovery-related motions they might bring in the future.

Lying at the root of all three grievances is plaintiffs' insistence that the Legislature and Executive (*i.e.*, the Government Accountability Board) are one. From this they deduce that whatever demand they make on the Executive acts also as a demand on the Legislature, and vice versa. Consequently, they grow frustrated when they find that the Government Accountability Board cannot compel the Legislature to produce certain documents, the Executive has privileges independent of those belonging to the Legislature, and that this Court's orders addressing the plaintiffs' discovery disputes with the Legislature do not adjudicate the Executive branch's rights or responsibilities. Because applying the separation of powers doctrine will untangle the plaintiffs' complaints and reveal them as unfounded, we will begin there.

The Government Accountability Board is an independent agency located in Wisconsin's Executive branch.¹ The Legislature, of course, is a separate branch of government unto itself. Thus, the plaintiffs' complaints implicate the "separation of powers" doctrine - one of the most elemental principles of constitutional government.²

At its most basic level, this doctrine stands for the proposition that one branch of government may not act in such a way as to subordinate another:

The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is implicit in the division of governmental powers among the judicial, legislative and executive branches. "The Wisconsin constitution creates three separate coordinate branches of government, *no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution*, and no branch to exercise the power committed by the constitution to another."

¹"'Independent agency' means an administrative agency within the executive branch created under subch. III." Wis. Stat. §15.01(9). The Government Accountability Board was created by §15.60, which is within subchapter III of Chapter 15, Wis. Stats.

Although the Government Accountability Board is located in the Executive branch, it is independent. That is to say, the members of the Board do not serve at the Governor's pleasure as with other departments and agencies. Instead, its members serve definite terms after Senate confirmation of the Governor's selection from nominations submitted by the Government Accountability Candidate Committee. Wis. Stat. §15.60(2) ("All members of the board shall be appointed from nominations submitted to the governor by a nominating committee to be called the governmental accountability candidate committee . . ."); Wis. Stat. §15.07(1)(a)2. ("Members of the government accountability board shall be nominated by the governor, and with the advice and consent of two-thirds of the members of the senate present and voting shall be appointed, to serve for terms prescribed by law."); Wis. Stat. §15.60(1) ("Members shall serve for 6-year terms.").

²"The doctrine of separation of powers, a fundamental principle of American constitutional government, is embodied in the clauses of the Wisconsin Constitution providing that the legislative power shall be vested in a senate and assembly (art. IV, sec. 1), the executive power in a governor and lieutenant governor (art. IV, sec. 1), and the judicial power in the courts (art. VII, sec. 2)." *State v. Washington*, 83 Wis.2d 808, 816, 266 N.W.2d 597 (1978).

State ex rel. Friedrich v. Circuit Court for Dane County, 192 Wis.2d 1, 13, 531 N.W.2d 32 (1995) (citations omitted, emphasis supplied).

For this reason the Executive branch may no more command the Legislature to legislate than the Legislature may command the Executive branch to execute the laws. And, more to the point, the Government Accountability Board (part of the Executive branch) cannot compel the Legislature to produce documents it chooses to withhold, or prevent the Legislature from invoking its own privileges. If it were otherwise, the Government Accountability Board would be able to “arrogate to itself control over the [Legislature]” in a way not provided by the constitution.

In light of these principles, the plaintiffs’ complaints resolve to a simple misunderstanding of the Legislature and Government Accountability Board’s separate and independent rights and responsibilities. The defendants did not make a “parody” of any deposition. Nor did they act “in league” with the Legislature in preventing the plaintiffs from asking legitimate questions. They appropriately protected the Executive branch’s privileged information against the plaintiffs’ unseemly trespasses. The plaintiffs do not understand this because, for some reason, they cannot understand the distinction between the objections raised by the Legislature and those raised by the Government Accountability Board.

While the Legislature instructed witnesses not to provide certain testimony relating to events leading up to and including the Legislature’s adoption of Acts 43

& 44, the defendants raised no such objections.³ Instead, the *defendants* raised “privilege” objections only at Mr. Handrick’s deposition, and then only to prevent plaintiffs’ counsel from inappropriately invading the Government Accountability Board’s attorney-client privilege, or its attorney’s work product. (Declaration of Douglas Poland ¶11 & Ex. 9 (Dkt. 89) (“Poland Dec.”); Kelly Dec. at ¶11.) That privilege, of course, is separate and apart from any privilege belonging to the Legislature.

Reinhart Boerner Van Deuren s.c. (“Reinhart”) was retained on November 22, 2011, to assist the Attorney General in representing the Government Accountability Board. (Kelly Dec. ¶12.) Mr. Handrick is a Reinhart employee who is assisting the attorneys defending this case.⁴ (*Id.* at ¶13.) To the extent any privilege covers his conversations and work product in that role, that privilege belongs to the Government Accountability Board, not the Legislature.

As plaintiffs’ counsel himself notes, he tried on 34 occasions in one deposition alone to trespass on the Government Accountability Board’s privileged information. (Poland Dec. ¶11 & Ex. 9) He did this by asking Mr. Handrick to disclose communications and information relating to his work for Reinhart on

³ Declaration of Daniel Kelly In Support Of The Defendants’ Response To Plaintiffs’ Motion To Extend Time In Which To Move To Compel Production Of Documents And Testimony at ¶10 (“Kelly Dec.”) (Dkt. 93).¶

⁴ Although Mr. Handrick previously provided consulting services to the Legislature through its attorneys (Michael Best & Friedrich), Mr. Handrick has provided no such services since at least November 22, 2011. (Kelly Dec. at ¶14.) Since November 22, 2011, Mr. Handrick’s responsibilities, as they relate to redistricting, have been solely to assist the attorneys representing the Government Accountability Board in this case. (*Id.* at ¶15.)

behalf of the defendants since November 22, 2011. (*Id.*) However, he never gave any explanation for his repeated and improper attempts to obtain information to which he must have known he had no right. (Kelly Dec. ¶16.) Nor has he explained why he seems to believe it proper to muddle the independent roles of the Legislature and the Executive branches of government with respect to the case at hand. (*Id.* at ¶17.)

The plaintiffs have made it clear they are incensed they did not get what they expected in the depositions, but that does not excuse their carelessness in venting their frustration at the Government Accountability Board. Their feud is with the Legislature, not the Executive branch.

Similarly, there is no basis for plaintiffs' second complaint theme – their disappointment that the Government Accountability Board has produced no documents about the Legislature's "intent" in passing 2011 Acts 43 & 44. They do not contend that the defendants have those documents; rather, they are piqued because the Government Accountability Board has not taken command of the Legislature and forced it to produce them. Not only does the Executive branch lack the authority to control the Legislature, the plaintiffs have acknowledged that the Government Accountability Board was not even involved in the drafting or adoption of 2011 Acts 43 & 44. If the plaintiffs really want evidence of legislative "intent" (rather than just a fight about it), they would do well to spend their time refining their discovery strategy rather than falsely impugning the Government Accountability Board .

Plaintiffs' third theme, embodied in their request for attorney's fees from defendants for any future discovery disputes, further illustrates their inability to distinguish between the Legislature and the Government Accountability Board.⁵ They imply that this Court's resolution of their discovery disputes with the Legislature also adjudicated the *defendants'* rights and responsibilities. They did not, and they could not, because the Legislature and the Government Accountability Board are not one. As the plaintiffs might recall, they directed their discovery motions at the *Legislature*. So to the extent the plaintiffs believe those discovery orders serve as a predicate for sanctions, they cannot fill that role with respect to the Government Accountability Board. The discovery orders have no spill-over effect on anyone else's obligations, and the Government Accountability Board is not responsible for the Legislature's actions.

Conclusion

The Court should disregard any aspersions offered by the plaintiffs against the Government Accountability Board.

Dated this 3rd day of January, 2012.

REINHART BOERNER VAN DEUREN s.c.

s/ Daniel Kelly
DANIEL KELLY
State Bar #1001941

⁵ Plaintiffs' request for future fees appears only in the Conclusion of their brief, but warrants comment here because it helps illuminate the depth of their error and the extent to which it confuses their analysis.

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